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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. ----------

CHARLES P. LUCAS, BRUCE GREEN, JR., DOROTHY M. BACON, JOHN T. GREEN, ALFRED HEAD, EDWIN L. PARMS, KENNETH W. CLEMENT, RUSSELL M. JONES and ALICE LEV,

Appellants,

vs.

JAMES A. RHODES, INDIVIDUALLY and AS GOVERNOR OF THE STATE OF OHIO, TED W. BROWN, SECRETARY OF STATE OF OHIO, JOSEPH J. LoPRESTI, GOVERNOR'S ADMINISTRATOR, and RAY T. MILLER, ALEXANDER L. DeMAIORIBUS, DAN W. DUFFY and SAUL G. STILLMAN, MEMBERS OF BOARD OF ELECTIONS OF CUYAHOGA COUNTY, OHIO,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT IN AND FOR THE NORTHERN DISTRICT OF OHIO.

JURISDICTIONAL STATEMENT.

OPINION BELOW.

The opinion below has not been officially or unofficially reported, but a copy is appended hereto in full as Appendix A, *infra*. The opinion was also adopted as findings of fact and conclusions of law by the trial court.

GROUND ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

Jurisdiction of this Court to review on direct appeal is conferred by 28 U. S. C. § 1253.

QUESTION PRESENTED.

Whether Section 3521.01 of the Ohio Revised Code, which creates the congressional districts now in effect in the State of Ohio, violates Article I, Section 2 of the United States Constitution.

STATEMENT OF CASE.

Summary of Proceedings and Evidence.

In May, 1965, appellants, plaintiffs below, filed suit in the District Court for the Northern District of Ohio, Eastern Division, challenging the constitutionality of Sec. 3521.01, Ohio Revised Code, a statute known as Amended Substitute House Bill No. 18 passed on December 17, 1964 by the Ohio General Assembly "relative to the apportionment of congressional districts." Joint Exhibit No. 1. The provisions of the statute became effective March 29, 1965, and an election of the congressmen from Ohio took place on November 8, 1966 pursuant thereto.[1] The trial was

[1] The Appellants sought injunctive relief to bar the 1966 election of Congressmen from districts created pursuant to Sec. 3521.01, Ohio Rev. Code. Appellants filed their application for a three-judge court concurrent with the filing of the Complaint on May 11, 1965, but it was not until January 28, 1966, that an order was entered designating a three-judge panel. Nominating petitions for Congress were filed by February 2, 1966, and primary elections for Congressmen were conducted on May 3, 1966. Sec. 3513.05, Ohio Rev. Code; Sec. 3513.01, Ohio Rev. Code. The parties were notified by letter dated August 19, 1967, that the hearing on the merits would be held on September 28, 1967, less than six weeks prior to the general election date. Thereupon, appellants requested continuance until after the general election date, which request was granted. The reason stated in the request was that chief counsel for appellants was engaged in an extended trial in state court.

For some reason, not disclosed, the majority opinion contained the following remark concerning appellants' request for continuance, "We do not choose to speculate as to the motives of counsel in that respect." (p. 22) The appellants' counsel had no "motives" other than for the reason stated and to follow

held on November 9, 1966, one day following the general election.

The appellants are residents, citizens, electors and tax payers in Ohio. The appellees, defendants below, are state officials responsible for the operation of the machinery for the election of congressmen from Ohio. The standing of the appellants and the capacity of appellees was set forth in Paragraphs I and III of the Complaint, admitted by the appellees in their Answer, and acknowledged by the court. (p. 6) [2] See 42 U. S. C. §§ 1983 and 1988.

The evidence consisted of documents stipulated by the parties, or introduced by one party without objection by the other, and testimony of two witnesses for the appellees.

There are two sets of population figures for the congressional districts in Ohio established by Sec. 3521.01,

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(Continued from preceding page)

existing decision of Supreme Court and other Federal Courts. Suit had been filed within six weeks of the effective date of the statute, and more than eight months prior to the last date upon which nominating petitions for Congress must be filed. Sec. 3513.05, Ohio Rev. Code.

With all due and proper respect to the administrative burdens of the court, the court did not give priority to the within case. More than eight months elapsed between the date of appellants' application for a three-judge court on May 11, 1965, and the granting thereof on January 28, 1966, and more than eight additional months elapsed between the appointment of the three judges and the original hearing date. Upon receiving notice of the September 28, 1966, hearing date, appellants' attorneys recognized that under no conditions would they be able to enjoin or set aside the November, 1966, general election for Congressmen and therefore requested a short continuance. See *Bush v. Martin*, 224 F. Supp. 499 (S. D. Tex. 1963), *aff'd Martin v. Bush*, 376 U. S. 222 (1964), and the multitude of congressional and legislative apportionment cases thereafter decided. The majority suggests that appellants' counsel are responsible for the delay in these proceedings. Counsel respectfully submit this is not accurate.

[2] All page references to the majority opinion and the dissent, Appendix A, are to the page numbers appearing in boldface type, in parentheses.

Ohio Rev. Code. One set is contained in appellants' Exhibit 1, showing the map of Ohio for Amended Substitute House Bill No. 18, published by the Ohio Legislative Service Commission on December 18, 1964. The second set is contained in appellants' Exhibit 2, the Congressional District Data Book Supplement published in August, 1966 by the Bureau of Census of the Department of Commerce. These population figures were incorporated in Table I of the majority opinion, and are as follows:

CONGRESSIONAL DISTRICT POPULATIONS

	Am. Sub. H.B. 18	*Census Bureau*
District No. 1	425,822	417,614
2	438,299	446,507
3	437,689	439,438
4	354,129	354,129
5	354,537	354,537
6	380,847	380,847
7	369,910	369,910
8	414,929	414,929
9	456,931	456,931
10	366,741	366,741
11	436,933	436,933
12	331,202	319,968
13	398,141	398,141
14	457,774	457,774
15	351,760	362,994
16	434,465	434,465
17	414,871	414,871
18	411,103	411,103
19	435,743	435,743
20	440,398	439,835
21	426,294	426,216
22	394,835	396,089
23	386,368	385,755
24	386,676	384,927

There is agreement between these sources as to the population in 14 of the 24 districts. The differences are found in the large metropolitan areas where there is more than one congressional district within a county, and in those additional areas where county boundary lines were ignored in the formation of districts. (Districts 1, 2, 3, 12, 15, 20, 21, 22, 23 and 24)

The Bureau of Census population figures are derived from the 1960 census for population tracts. See appellants' Exhibit 2. According to the testimony of appellees' witness, Representative Charles Kurfess, the only population figures available to the Committee to Study Congressional Redistricting were the 1960 census for counties and political subdivisions. (Tr. 44) This Study Committee also referred to other data provided by the Department of Development of Ohio, the Citizens League of Greater Cleveland and others, but none of this supporting data was introduced in evidence or available at the trial. (Tr. 44-45)

The most significant population variance between these sets of figures is for District No. 12, the smallest congressional district in the state. The Ohio Legislative Service Commission document provides a population of 331,202, and the Census Bureau evidences a population of 319,968, a difference of 11,234. Appellants submit that the Census Bureau figures are the more accurate and impartial. The majority opinion stated that this difference was not "critical to decision of this case." (p. 8)

An analysis of the population figures, in accordance with the tests and measurements adopted by the courts in congressional districting cases and incorporated in Table I of the majority opinion, is as follows:

	Am. Sub. H.B. 18	*Census Bureau*
1. Population by 1960 Census		
Largest District (14)	457,774	457,774
Average District	404,333	404,333
Smallest District (12)	331,202	319,968
2. Per Cent (%) of Variance from Average District		
Largest District (14)	+13.2%	+13.2%
Smallest District (12)	—18.1%	—20.9%
Total % of Variance	31.3%	34.1%
3. Population Difference between Largest & Smallest Districts	126,572	137,806
4. Ratio between Largest and Smallest Districts	1.382 to 1	1.430 to 1

	Am. Sub. H.B. 18	*Census Bureau*
5. Average % of Variance		
all Districts	7.69%	7.71%
Districts above Average	6.10%	6.93%
Districts below Average	8.39%	8.40%
6. Number of Districts with more than:		
5% Variance from Average	17	16
6% Variance from Average	14	14
7% Variance from Average	14	14
8% Variance from Average	12	12
9% Variance from Average	7	8
7. Per Cent (%) of Population Necessary to Elect Majority of Congressmen	46.2%	46.2%

The appellants submitted this case to the Court solely on the question of whether Sec. 3521.01, Ohio Rev. Code, violates the constitutional rights of plaintiffs established by Article I, Section 2 of the Constitution of the United States.

The appellants withdrew all averments relating to the argument that the Ohio statute violated the Due Process, Equal Protection, and Privileges and Immunity Clauses of the Fourteenth Amendment. (Tr. 5, 6, 7) As emphasized in *Wesberry v. Sanders*, 373 U. S. 1 (1964), more fully discussed hereinafter, the issue here raised under Article I, Section 2 is a "wholly separate question" from those presented by an attack on the statute under the Fourteenth Amendment.[3] See 376 U. S. 1, 8, n. 10.

Accordingly, appellants offered no evidence under Paragraphs VIII, XI, XII, and XIV of the Complaint where reference is made to the Fourteenth Amendment, because

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[3] The hearing in this case was held prior to the ruling of the Court in *Duddleston v. Grills*, ____ U. S. ____, 35 U. S. L. WEEK 3233 (U. S. Jan. 10, 1967). See discussion at p. 12. The statistical data adduced in this case and analyzed above fully supports the conclusion that the congressional districts created by Sec. 3521.01, Ohio Rev. Code, contravene the equal protection clause of the Fourteenth Amendment now, apparently, applicable to congressional districting by states.

appellants believe that the issue of whether Section 3521.01, Ohio Rev. Code, violated Article I, Section 2 of the Constitution of the United States is precise, and that the evidence in the case fully and clearly demonstrated that Sec. 3521.01, Ohio Rev. Code, is unconstitutional.

Appellants did not contend, or request the court to find, that the congressional districts were improperly constituted because of partisan or political motivation. Such issue, appellants stated, is non-justiciable. (Tr. 21) Sound reasoning for a "hands-off" posture by the court on this type of issue is stated in *Jones v. Falcey*, 48 N. J. 25, 222 A.2d 101 (1966), wherein the court said:

> "Perhaps it would be more accurate to say such issues are beyond judicial condemnation, not because the controversy is beyond the jurisdictional authority of the Court, but rather because the Constitution does not prescribe a single approach or motivation for the drawing of district lines, and hence the Constitution is not offended merely because a partisan advantage is in view. Indeed, it would be difficult to separate partisan interests from other interests, since partisan interests may well be but a summation of such other interests. In addition, it would seem impossible for a court to pass upon the validity of political interests without itself making a political judgment or appearing to do so. For these reasons the view generally taken in this new area of judicial activity is that, if the mathematics are acceptable, it rests with the voters, rather than the Court, to review the soundness of the partisan decisions which may inhere in the lines the Legislature drew. Actual experience of course may generate exceptions to that approach." (222 A. 2d at 105)

See also *W. M. C. A. v. Lomenzo*, 238 F. Supp. 916 (S.D. N.Y.), *aff'd* 382 U. S. 4 (1965); *cf. Grills v. Branigan*, 255 F. Supp. 155, 159 (1966) (Holder, J., dissenting).

The Opinion of the Trial Court.

On May 10, 1967, a majority of the Court, pursuant to Rule 52(a), Federal Rules of Civil Procedure, entered its finding of facts and conclusions of law upholding the constitutionality of Sec. 3521.01, Ohio Rev. Code. The order that was thereafter filed denied all relief requested by appellants.

After reviewing the population data set forth above, and citing *Kilgarin v. Hill*, __ U. S. __, 35 U.S.L. Week 3293 (U. S. Feb. 20, 1967) as to the burden of proof required, the majority reached a *preliminary* conclusion, as follows:

> "The conclusion is inescapable that in the congressional districting case before this Court the population inequality shown by plaintiffs requires justification by defendants." (p. 10)

The responsibility of appellees in "justification" of the Sec. 3521.01, Ohio Rev. Code, was defined by the majority opinion as follows:

> "So it was incumbent on Ohio's legislature to draw up a plan which would represent a good faith effort on its part to meet constitutional standards, and which would be practical, workable, and as fair as men could make it, in light of available criteria suggested by United States Supreme Court decisions as of November 10, 1964." (p. 17)

The criteria upon which the Ohio General Assembly acted were contained in the Report of the (Joint) Committee to Study Congressional Redistricting. Joint Exhibit No. 2. The majority opinion made reference to these criteria only by citing the testimony of Representative Kurfess (Tr. 40-42), and stated, without any legal analysis of these criteria, as follows:

"The other evidence presented in this case is convincing that these criteria were in fact followed in good faith." (p. 21)

The majority then concluded:

"* * * the State has presented rational reasons for seeming population variation between congressional districts. We find those reasons to be legally acceptable upon the principles we have articulated herein * * *"

"We hold that upon the facts presented, giving due recognition to purely academic propositions as well as to practical feasibility the Ohio Plan of Districting affords practical equality of congressional districts as is constitutionally required. The Court finds Section 3521.01 of the Ohio Revised Code to be constitutional in all respects." (p. 24)

Judge Celebrezze, Circuit Judge, entered a strong dissent, which is cited by appellants in their Argument.

THE QUESTION PRESENTED IS SUBSTANTIAL.

SECTION 3521.01, OHIO REV. CODE, WHICH CREATES THE CONGRESSIONAL DISTRICTS NOW IN EFFECT IN THE STATE OF OHIO, VIOLATES ARTICLE I, SECTION 2 OF THE UNITED STATES CONSTITUTION.

The Constitutional Standard of Article I, Section 2 Applicable to Congressional Representation Is Population Alone.

The landmark case of congressional apportionment is *Wesberry v. Sanders*, 376 U. S. 1 (1964). The fundamental constitutional principle is there stated in simple and emphatic terms. The Court said,

"We hold that, construed in its historical context, the command of Art. I, Sec. 2, that Representatives be

> chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." (*Id.* at 7-8)

and,

> "It would defeat the principle solemnly embodied in the Great Compromise—equal representation in the House for equal numbers of people—for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others." (*Id.* at 14)

and further,

> "While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us." (*Id.* at 18)

The first construction of the constitutional standards enunciated in the *Wesberry* case appeared in Justice Harlan's dissent, as follows:

> "In the last congressional election, in 1962, representatives from 42 States were elected from congressional districts. In all but five of those States, the difference between the populations of the largest and smallest districts exceeded 100,000 persons. A difference of this magnitude in the size of districts the average population of which is less than 500,000 is presumably not equality among district 'as nearly as is practicable,' although the court does not reveal its definition of that phrase." (*Id.* at 20-21)

In the series of legislative apportionment cases decided by the Supreme Court in 1964, the opinions reflected

on the objectives and constitutional standards set down in the *Wesberry* case. In *Reynolds v. Sims*, 377 U. S. 533 (1964), the Court said,

> "In Wesberry v. Sanders, (citations omitted) we held that attacks on the constitutionality of congressional districting plans enacted by state legislatures do not present nonjustifiable questions and should not be dismissed generally for 'want of equity.' We determined that the constitutional test for the validity of congressional districting schemes was one of substantial equality of population among the various districts established by a state legislature for the election of members of the Federal House of Representatives.
>
> "In that case we decided that an apportionment of congressional seats which 'contracts the value of some votes and expands that of others' is unconstitutional, since 'the Federal Constitution intends that when qualified voters elect members of Congress each vote be given as much weight as any other vote * * *.'" (*Id.* at 559)

and,

> "* * * Wesberry clearly established the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State." (*Id.* at 561)

The Supreme Court stated in the *Reynolds* case that in addition to drawing on different clauses of the Constitution, a stricter constitutional standard is required for congressional districts than for legislative apportionment. The Court said,

> "In Wesberry v. Sanders, supra, the Court stated that congressional representation must be based on population as nearly as is practicable. In implementing the basic constitutional principle of representative gov-

ernment as enunciated by the Court in Wesberry—equality of population among districts—some distinctions may well be made between congressional and state legislative representation. Since, almost invariably, there is a significantly larger number of seats in state legislative bodies to be distributed within a State than congressional seats, it may be feasible to use political subdivision lines to a greater extent in establishing state legislative districts than in congressional districting while still affording adequate representation to all parts of the State. To do so would be constitutionally valid, so long as the resulting apportionment was one based substantially on population and the equal-population principle was not diluted in any significant way. Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting." (*Id.* at 578-79)

The majority opinion recognized that "a more strict constitutional standard is demanded in congressional districting cases than is required in state legislative reapportionment cases." (p. 14) However, the distinction of standards between congressional district cases, on the one hand, and legislative apportionment cases, on the other, appears to have been minimized, if not extinguished, by the Supreme Court's decision in *Swann v. Adams*, ____ U. S. ____, 35 U. S. L. Week 4101 (U. S. Jan. 10, 1967), a legislative apportionment case and the Court's per curiam order the same day in *Duddleston v. Grills*, ____ U. S. ___, 35 U. S. L. Week 3233 (U. S. Jan. 10, 1967), a districting case, which vacated the judgment and remanded to the District Court with instructions to reconsider "in light of *Swann v. Adams*, No. 136, October Term, 1966, decided this day. *Wesberry v. Sanders*, 376 U. S. 1, and *Reynolds v. Sims*, 377 U. S. 533." See footnote 1, page 17, of majority opinion.

In the many cases arising since the *Wesberry* case, the federal and state courts have formulated and articulated reasonable, logical and consistent standards against which the constitutionality of any congressional districting plan may be measured.

In the case of *Drum v. Seawell*, 250 F. Supp. 922 (M.D.N.C. 1966), the Court, in reviewing the North Carolina Congressional Redistricting Act, said,

> "While rigid mathematical standards are not the sine qua non of constitutional validity, practical and rational equality is required. Such equality recognizes only minor deviations which may occur in the recognition of rational and legitimate factors, free from the taint of arbitrariness, irrationality and discrimination." (*Id.* at 924)

In the Maryland case of *Maryland Citizens Comm. for Fair Cong. Redist. v. Tawes*, 253 F. Supp. 731 (D. Md. 1966), after citing the *Drum* case, the court said,

> "Even if a district plan initially comports with the one-to-one formula, discrepancies may be expected to arise with changing conditions. Such discrepancies are unavoidable and must be tolerated for a time, till the next census, but in initial districting the aim should be to come as closely as possible to a one-to-one ratio." (*Id.* at 733)

The court reviewing the Texas congressional redistricting plan in *Bush v. Martin*, 251 F. Supp. 484 (S. D. Tex. 1966), articulated a two step test. It said,

> "* * * we must ascertain, first, whether there has been a 'faithful adherence' to the principle of equality and, second, whether deviations from this principle were the result of recognizing 'certain factors that are free from any taint of arbitrariness or discrimination.'" (*Id.* at 497)

Further, in that case, the court noted the effect of overpopulation in a congressional district. It said,

"But it is obvious that in a district which is over populated it is not just the excess people who suffer; every person in such a district has his vote diluted." (*Id.* at 499)

That population is the sole criteria for creation of congressional districts is emphatically stated in the case of *Preisler v. Secretary of State*, 257 F. Supp. 953 (W.D. Mo. 1966), *Aff'd sub nom. Kirkpatrick v. Preisler*, 35 U. S. L. Week 3233 (U. S. Jan. 10, 1967). The court said:

"The basic constitutional principle of equal representation established by Art. I, Sec. 2 forbids and eliminates, so far as congressional representation is concerned, the consideration of any factor other than population. Use of such words as 'feasible' and 'practicable' in a careful statement of the fundamental constitutional principle constitutes but a recognition that the familiar doctrine of *de minimis* is applicable and is designed to make clear that a State legislature would not be expected to create entirely new political subdivision lines in order to have absolute and precise mathematical equality in its congressional districts." (257 F. Supp. 953, 973)

See also *Meeks v. Anderson*, 229 F. Supp. 271, 273 (D. Kan. 1964).

The majority opinion acknowledged that population is the "determinant factor" in congressional districting cases. (p. 15)

The *de minimis* test was also adopted in *Calkins v. Hare*, 228 F. Supp. 824 (E. D. Mich. 1964). The Court said,

"One factor and one alone is controlling, the factor of population. It is true that the Wesberry court speaks of one vote being 'as nearly as practicable' worth that of another, but we do not see in these words an escape hatch for the reluctant. Nor in the caveat that the weight of votes need not be math-

ematically precise. What is meant here is merely that the ideal district lines enclosing mathematically equal areas of population may make minor departures here and there from such ideal, in accordance with the needs of the situation, and without 'unnecessarily' (Wesberry, page 535) abridging the people's rights. But these are minor concessions to practicability, the avoidance of ideal mathematical precision, merely. They are the application in this field of the well-known de minimis doctrine. Should the concessions made result in substantial (not minimal) and unnecessary inequalities between the districts, the lines of unconstitutionality will have been crossed." (*Id.* at 829)

See also *Jones v. Falcey, supra,* 222 A. 2d at 108. To this extent the majority opinion, at p. 15, stated that "* * * the limits of 'practicality' have been construed to include only *de minimis* deviations from exact equality." Yet the court, under the guise of 'practicality,' avoided the application of the standard. (pp. 20-24)

The defense has, on occasion, argued that a redistricting act of the legislature is entitled to a presumption of constitutionality. This argument has been rejected. In the case of *Calkins v. Hare, supra,* the first district court decision on the substantive questions after the *Wesberry* case, the court said,

"In our consideration of this case, we start with the principle that the right of franchise is 'a fundamental political right, because preservative of all rights.' This being the case we do not equate the presumption of constitutionality in this situation to that employed in the general police power cases, involving the regulation of health or morals, or the fixing of guide lines for a state's experimentations in matters of social welfare or economic controls. In these cases the states are properly given a wide latitude. But where we are concerned with a basic constitutional right our

> requirements are infinitely more rigorous. Here the cloak of constitutionality is not loosely worn. There is little elbow room for freedom of movement. The fit must be precise. We do not experiment with freedome of speech, freedom of worship or freedom to vote. These are among the basic civil rights of man." (*Id.* at 827)

See also, *Kilgarin v. Hill, supra.* The majority opinion allegedly adopts this standard. (p. 13)

Nor may the court presume, in the absence of legislative history, that the legislature had adequate and sufficient reasons for redistricting in the manner it did. In the case of *Jones v. Falcey, supra,* the court said,

> "The record contains no explanation for any of the deviations described above. The Attorney General says we should assume that adequate reasons do exist, in the absence of proof excluding them. We cannot accept that approach, for here, upon the face of things, the constitutional command for equality has been breached." (*Id.* at 109)

In finding "justification" for the Ohio statute, the majority concluded that the "* * * State has presented rational reasons for seeming population variation between congressional districts." (p. 24). In that the record is devoid of factual data or documentary evidence to support the "criteria" allegedly followed by the Ohio General Assembly, other than naked declaration made by Representative Kurfess, the majority had to presume the existence of such evidence to reach the conclusions appearing in their opinion.

A Review and Analysis of Federal and State Decisions Clearly Demonstrates That the Ohio Congressional Districting Plan Created by Section 3521.01, Ohio Rev. Code, Is Unconstitutional.

Beginning with the Michigan case of *Calkins v. Hare, supra,* and ranging through *Jones v. Falcey, supra,* the most recently reported case, and *Wells v. Rockefeller,* ____ F. Supp. ____ (No. 66-1976) (S. D. N. Y.), the most recent federal court case, the federal and state courts have reviewed the constitutionality of congressional redistricting statutes in light of *Wesberry v. Sanders, supra.* Each of these courts has discussed and analyzed the *Wesberry* case, has compared *Wesberry* with *Reynolds v. Sims, supra,* and the other legislative apportionment cases, has formulated and articulated standards for measuring the constitutionality of the congressional district plan in question and, as the cases have been reported, cited and discussed the opinions handed down in the other courts.

In *Swann v. Adams, supra, Duddleston v. Grills, supra,* and *Kirkpatrick v. Preisler, supra,* the Supreme Court has affirmed the criteria formulated by the state courts and lower federal courts.

The principal approach taken by all of the courts has been to translate the constitutional concept of "equal representation for equal numbers of people" into meaningful mathematical symbols. Although all courts have disclaimed mathematical exactness and rigidity, they have, in fact, subjected a congressional district plan to full and proper examination only by the use of tests based upon mathematical considerations.

The *Ohio Congressional Districting Act, Sec. 3521.01, Ohio Rev. Code, fails to meet minimum constitutional standards. Irrespective of the means or techniques of*

measurement, by comparison with each and every congressional districting case decided, the Ohio districts have failed the test.

The majority opinion, at pages 6-7, adopted (without citation) three of the criteria of measurement formulated by the other courts, as follows: first, the numerical ratio of the population of the largest district compared with the population of the smallest district; second, the per cent of variances of the population of the largest and smallest districts from the population of the average or ideal district; and third, the excess, or lack, of population in the largest or smallest district when compared with the population of the average district. The Court concluded that "three foregoing tests will suffice." (p. 7) However, the majority opinion chose to ignore the most important standard of evaluation, and the standard most widely used by the courts, that of the difference in population between the largest and smallest districts. In every case decided in this area, the court has viewed this population figure as the most significant. In those states where congressional districting plans have been reviewed by the courts, the relevant data is as follows:

State	Population Difference between Largest and Smallest Districts	Court Held Plan to Be:
Arkansas[4]	242,541	Unconstitutional
Virginia[5]	214,208	Unconstitutional
Michigan[6]	189,104	Unconstitutional
OHIO[7]	137,806	Constitutional
Missouri[8]	128,355	Unconstitutional
Montana[9]	126,379	Unconstitutional
New York[10]	120,366	Unconstitutional
Maryland[11]	113,505	Unconstitutional
Tennessee[12]	111,830	Unconstitutional
Massachusetts[13]	102,626	Unconstitutional
Missouri[14]	84,655	Unconstitutional
Indiana[15]	84,545	Unconstitutional
Texas[16]	80,892	Constitutional
North Carolina[17]	71,640	Unconstitutional
New Jersey[18]	64,760	Unconstitutional (in part)
Arizona[19]	61,244	Court Plan
Illinois[20]	57,046	Court Plan
New Hampshire[21]	56,715	Constitutional
Alabama[22]	52,120	Constitutional
Montana[23]	20,682	Court Plan
Kansas[24]	15,060	Constitutional
Maryland[25]	5,624	Court Plan

[4] *Park v. Faubus*, 238 F. Supp. 62 (E. D. Ark. 1965).

[5] *Wilkins v. Davis*, 205 Va. 803, 139 S. E.2d 849 (1965).

[6] *Calkins v. Hare, supra.*

[7] *Lucas v. Rhodes*, ____ F. Supp. ____ (No. C 65-264) (N. D. Ohio, 1967) (The within case).

[8] *Preisler v. Secretary of State*, 238 F, Supp. 187 (W.D. Mo. 1965).

[9] *Roberts v. Babcock*, 246 F. Supp. 396 (D. Mont. 1966).

[10] *Wells v. Rockefeller, supra.*

[11] *Maryland Citizens Comm. for Fair Cong. Redist. v. Tawes, supra.*

[12] *Baker v. Clement*, 247 F. Supp. 886 (M. D. Tenn. 1965).

[13] *Dinis v. Volpe*, ____ F. Supp. ____ (No. 66-767-G) (D. Mass. 1967).

[14] *Preisler v. Secretary of State, supra.*

[15] *Grills v. Branigan, supra.*

[16] *Bush v. Martin, supra.*

[17] *Drum v. Seawell, supra.*

(Continued on following page)

In Ohio the difference in population between District No. 14, the largest, and District No. 12, the smallest, is 137,806.

In the first case reviewing the Missouri Congressional Redistrict Act of 1963 (Ch. 128, R. S. Mo.), the relevant data shows a population difference of 128,355 between the largest and smallest districts. *Preisler v. Secretary of State,* 238 F. Supp. 187 (W. D. Mo. 1965). The district court, referring to the opinion of Justice Harlan in the *Wesberry* case, stated that there was "presumptive malapportionment" because the variance was in excess of 100,000. *Id.* at 190. In the Tennessee case of *Baker v. Clement,* 247 F. Supp. 886 (M. D. Tenn. 1965) the court held unconstitutional the 1966 Tennessee Congressional Districting Plan (Ch. 4, P. A. of Extra Ses. of 1965, T. C. A. Sec. 2-502.). It said, "We reject all contentions that the constitutional test has been met where there exists a disparity of 111,830 between the Second and Sixth Districts, a disparity of 100,048 between the First and Sixth Districts, a disparity of 94,953 between the Third and Sixth Districts, and a disparity of 70,117 between the Fourth and Sixth Districts." *Id.* at 896. The population disparity between districts in Ohio is a significantly greater population variance than that reluctantly tolerated by the district courts in the Texas (*Bush v. Martin, supra*) and

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[18] *Jones v. Falcey, supra.*

[19] *Klahr v. Goddard,* 250 F. Supp. 537 (D. Ariz. 1966).

[20] *Kirby v. Illinois State Electoral Bd.,* 251 F. Supp. 908 (N.D. Ill. 1965).

[21] *Levitt v. Maynard,* 202 A.2d 478 (N. H. 1964).

[22] *Moore v. Moore,* 246 F. Supp. 578 (S. D. Ala. 1965).

[23] *Roberts v. Babcock, supra.*

[24] *Meeks v. Avery,* 251 F. Supp. 245 (D. Kan. 1966).

[25] *Maryland Citizens Comm. for Fair Cong. Redist. v. Tawes, supra.*

Indiana (*Grills v. Branigan*, 255 F. Supp. 155 (S. D. Ind. 1966), *rev'd sub nom. Duddleston v. Grills*, 35 U. S. L. Week 3233 (U. S. Jan. 10, 1967)) cases. It far exceeds the maximum limits of 100,000 suggested by Justice Harlan in the *Wesberry* case. 376 U. S. 1, 20-21. As Judge Celebrezze observed, "(e)very case where the population difference between the largest and smallest district exceeded 100,000 held the congressional districting unconstitutional." (pp. d6-7)

The majority opinion is grounded on the assumption that a "good faith effort" to meet constitutional standards was all that was required. (p. 17) The majority may have been mindful of that phrase as used in *Reynolds v. Sims, supra* at 577. Similar language was used in the opinions of the courts in *Meeks v. Avery*, 251 F. Supp. 245, 252 (D. Kan. 1966), and in *Moore v. Moore*, 246 F. Supp. 578, 582 (S. D. Ala. 1965), but in Kansas, the population difference between largest and smallest districts was only 15,060 (a ratio of 1.035 to 1), and in Alabama, was 52,120 (a ratio of 1.132 to 1). In Ohio, the ratio, as shown, was 1.430 to 1.

The population variance between Districts 12 and 14 is more than twice that adopted in the temporary court plan for Arizona (*Klahr v. Goddard*, 250 F. Supp. 537 (D. Ariz. 1966)), and more than twenty-five times greater than the redistricting plan for Maryland (*Maryland Citizens Comm. for Fair Cong. Redist. v. Tawes, supra*). The Kansas legislature adopted a plan that created a population variance between the largest and smallest districts less than one-eighth (⅛) than that existing in Ohio, and the court there found that the Kansas plan only achieved "minimum" constitutional standards. *Meeks v. Avery, supra.*

District 12, with a variance of —20.9% from the average size district in Ohio, has the greatest variance of all the congressional districts in the entire United States. Appellants' Exhibit 3, p. 2006.

The —20.9% variance of District 12 from the average district is almost three times greater than the maximum variance found to be acceptable in Alabama (*Moore v. Moore, supra*) and more than ten times the variance resulting in the Kansas Districting Act. *Meeks v. Avery, supra.* A population variance of 9.9% from the average district was held unconstitutional in the Missouri case (*Preisler v. Secretary of State, supra*), as were 14% variances in the Maryland and Tennessee cases. *Maryland Citizens Comm. for Fair Cong. Redist. v. Tawes, supra; Baker v. Clement, supra.* Judge Celebrezze observed, "(e)very case where the percentage of variance exceeded ten per cent, held the congressional redistricting unconstitutional, except *Grills v. Branigan*, S. D. Ind. (1966), 255 F. Supp. 155, and that case was reversed and remanded by the Supreme Court." (p. d7).

The ratio of equality between Districts 12 and 14 of 1.43 to 1 is more than twice the acceptable ratio in any case.

The average percent (%) of variance of all districts in Ohio is 7.71%. The North Carolina districting plan showing an average variation of 3.46%, less than one-half that in Ohio, was held to be unconstitutional. *Drum v. Seawell, supra.* In Texas, with 23 congressional districts, the average per cent of deviation was 5.5%, and, the court said, that any greater variance would be "condemned." *Bush v. Martin, supra* at 513.

The taint of arbitrariness, irrationality and discrimination is clearly evidenced in those Ohio districts in which county boundary lines have been ignored: Districts 11,

14, 16 and 19 with variances of +8.0%, +13.2%, +7.4% and +7.7%, respectively. Wide variances also exist in many districts in which the large municipalities have been haphazardly allocated to districts. Districts 3, 12 and 15 with variances of +8.7%, —20.9% and —13.0%, respectively, are examples. In *Drum v. Seawell, supra*, the court not only considered the population figures, but also the nature of the district boundary lines into which the population was distributed. It said:

> "The tortuous lines which delineate the boundaries of many of the congressional districts under the proposed plan, the resulting lack of compactness and contiguity, and the failure to achieve equal representation for equal numbers of people as nearly as practicable compels us to hold that the congressional apportionment is constitutionally invalid." (*Id.* at 925.)

See also, *Jones v. Falcey, supra*. The majority opinion did not take note of district boundary lines in Ohio.

The legislature elected to carve up Summit County to add population to an over-populated District 11 (+8.0%), but ignored neighboring District 13 (—1.6%).

District 12 (—20.9%), the smallest district in Ohio, is wholly contained within Franklin County. Yet Delaware County with a population of 36,107, contiguous to Franklin County, was placed in the eight county District 8.

The population in every district in Northeast Ohio (Districts 11, 14, 16, 17, 18 and 19) exceeds the average, ranging from +1.6% to +13.2%. Representative Kurfess stated the legislative committees had information that District 11 (+8.0%) contained counties that constitute some of the fastest growing areas in the State of Ohio. (Tr. 64)

Representative Kurfess claimed that the legislature started the districting process in the "Montgomery-Butler County area" (Tr. 68). The very first district it created (District 3) had a population of 35,005 greater than the average district, and a population of 119,470 greater than District 12, the other critical area of the state. (Tr. 68) District 24, a new district, adjoining District 3 and containing part of Montgomery County, ended up with a population of only 384,927, or 54,511 less than District 3; yet the legislature zig-zagged through the municipalities in Montgomery County. See map on page 9 of Appellants' Exhibit No. 2.

The Criteria Upon Which the Ohio Congressional Districting Plan Is Allegedly Based Are Invalid.

In *Swann v. Adams, supra,* the Court reversed the judgment entered by the District Court for the reason that the state failed to "present or the District Court to articulate acceptable reasons for the variations among the populations of the various legislative districts with respect to both the Senate and House of Representatives." ____ U. S. ____, 35 U. S. L. Week 4104 (U. S. Jan. 10, 1967). The Supreme Court further stated:

> "* * * None of our cases suggests that the differences of this magnitude will be approved without a satisfactory explanation grounded on acceptable state policy. On the contrary, the *Reynolds* opinion limited the allowable deviations to those minor variations which 'are based on legitimate considerations incident to the effectuation of a rational state policy.' 377 U. S. 533, 579. Thus that opinion went on to indicate that variations from a pure population standard might be justified by such state policy considerations as the integrity of political subdivisions, the maintenance of compactness and contiguity in legislative districts

on the recognition of natural or historical boundary lines. Likewise, in *Roman v. Sincock*, 377 U. S. 695, 710, the Court stated that the Constitution permits 'such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.'" (*Ibid.*)

The Report of the (Joint) Committee to Study Congressional Redistricting (Joint Exhibit No. 2), recommended four "criteria" to be used by the General Assembly "as guidelines in drawing new congressional districts in Ohio." Appellants challenged these criteria on two grounds. First, these criteria are without merit or legal basis, and each has been rejected by the federal and state courts when offered by the defendants therein. Second, the legislature did not honestly and faithfully adhere to the standards the Study Committee had recommended. For the most part, as the documents, and testimony of Representative Kurfess, demonstrated, these criteria were ignored. (Tr. 42-70)

The majority opinion did not examine whether there was sufficient legal basis for the criteria, nor whether these criteria were "based on legitimate considerations incident to the effectuation of a rational state policy." *Reynolds v. Sims, supra* at 579. It approved the standards, and incorporated them by reference to the testimony of Representative Kurfess, and concluded that, "(t)he other evidence presented in this case is convincing that these criteria were in fact followed in good faith", without analysis or any reference to what was the "other evidence." (pp. 20-21)

The first criterion contained in the Committee Report was as follows: "That, in meeting the court's admonition to equalize population among congressional districts, the population of each district be within 15% of the average

district size of the state." Representative Kurfess testified that this figure of 15% was derived from the so-called Celler Bill (H. R. 5505) then pending in Congress. Appellees' Exhibit I. Appellants call to the attention of the Court that H. R. 5505 was not approved by the United States Senate, is not the law of the land, and note that H. R. 5505 was approved by the congressmen who were the beneficiaries of a malapportioned House of Representatives.

Appellants raised the question of the source of this magical number of 15%? Congressman Celler, sponsor of H. R. 5505 and Chairman of the Judiciary Committee, said,

> "When the bill was originally offered, it was 10 percent above and below. It was then advanced to 12½ percent. Some of the members of the Judiciary Committee wanted it 20 percent. The members felt that was too large a spread, and there was a compromise, and the compromise was at 15 percent." (Appellees' Exhibit H, p. 4944)

Appellants do not believe that their constitutional rights may or should be compromised by legislative acts.

Appellants note that the Study Committee did not adopt and incorporate in its criteria the other principal standard contained in H. R. 5505; namely, that there must be "compactness" in the districts. Congressman Celler, in defining this term, said,

> "What is meant by 'compactness'? I believe compactness is well described in the report, which says as follows:
>
> By compactness, the committee means, with respect to any congressional district, the absence of the conditions and purposes underlying the following dictionary definition of 'Gerrymander': 1) To divide (a territorial unit) into election districts in an un-

natural and unfair way with the purpose of giving one political party an electoral majority in a large number of districts while concentrating the voting strength of the opposition in as few districts as possible.

2) To divide (an area) into political units in an unnatural and unfair way with the purpose of giving special advantages to the one group." (Appellees' Exhibit H, p. 4944)

This standard of compactness, said Congressman Celler, was of equal importance with the standard of population equality. *Id.* at 4952. The majority opinion recognized that "compactness and contiguity of the territory to be included in a congressional district are proper factors for consideration in drawing physical boundaries" (p. 16); but made no finding that such compactness and contiguity of territory was observed in the formation of districts in Ohio. To the contrary, compactness and contiguity are noticeably absent. See Appellants' Exhibit 2, pp. 3, 4, 5, 6, 7, 8, 9, where the boundary lines of Districts 1, 2, 11, 12, 14, 15, 19, 20, 21, 22 and 23 are set out in detail.

In the current session of Congress, legislation affecting congressional districting has been considered by both the House of Representatives and Senate. H. R. 2508, as approved by the House of Representatives on April 27, 1967, would allow a deviation between districts so that "the district with the largest population so established shall not exceed by more than 30 per centum the district with the smallest population in the number of persons." 113 Cong. Rec., H. 4770 (daily ed., April 27, 1967). This bill was amended in the Senate on June 8, 1967, to allow a variance of only 10% between the population of the largest and smallest districts. 113 Cong. Rec., S. 7872 (daily ed., June 8, 1967). Both the House and Senate versions also

contained language which established a standard of compactness. When the Senate did not concur in the House version of H. R. 2508, the bill was sent to a conference. 113 Cong. Rec., S. 7873 (daily ed., June 8, 1967). The latest published report at the time of writing of this brief indicated deadlock among the conferees.

There is no statute enacted by Congress, and signed by the President, against which to measure the Ohio congressional districts. Therefore, it is not necessary to discuss or analyze, at this time, whether a congressionally stated maximum per cent of variance or deviation is merely "permissive" or "absolute," and if the latter, whether consistent with the principle of "equality of population between districts" as required by the Constitution. See Debates in House of Representatives 113 Cong. Rec., H. 4759-4760 (daily ed., June 27, 1967). Suffice it to say at this juncture, that the per cent of variance of population between the largest and smallest congressional districts in Ohio falls outside the maxium amount established in either the House or Senate version of H. B. 2508.

In evaluating this arbitrary figure of 15%, the significant factor is that the courts which have reviewed congressional districting plans have not accepted such standard. A policy of the Missouri General Assembly to "stay within an arbitrary figure of 10 per cent above and below the mean," was rejected by the court as a valid standard. *Preisler v. Secretary of State,* 257 F. Supp. 953, 967. See also *Bush v. Martin, supra* at 513. An arbitrary figure such as this creates a "wholly false standard," said the court in *Calkins v. Hare, supra* at 828. The court further stated,

> "Nor is it the answer to a charge that only 10,000 people are deprived of their right to vote, this being but a small percentage of the entire voting population.

These 10,000 have a right to vote equally with others no matter what percentage of the total they comprise." (*Ibid.*)

The second criterion recommended by the Study Committee to the Ohio General Assembly was that "the 1960 federal Decennial Census be used as the basic source for population data, with consideration given to estimates of 1964 population in order to reflect the rate of population increase or decrease in various parts of the State. * * *"

This criterion has been emphatically rejected by the courts, because of the vagueness and uncertainty involved in such speculative ventures. In the case of *Maryland Citizens Comm. for Fair Cong. Redist. v. Tawes, supra,* the court said,

"A difficulty encountered by anyone who undertakes in 1966 to draw district lines with a view to achieving substantial population equality, is that the only accurate figures available are those from the 1960 census. The dilemma presents two possible choices: to accept the 1960 census figures which are not up to date, or to attempt to make estimates of changes in population figures since that date. Neither choice is a happy one, but we have concluded that it is better to adhere to the census figures than to engage in speculative estimates or projections which vary widely with the estimators and manner in which they handle the figures available to them from various sources. The alternative we have rejected would indeed lead into a mathematical thicket." (253 F. Supp. 731, 734)

In the Michigan case of *Calkins v. Hare, supra,* the court said,

"He states, without documentation or proof of any kind, that the Legislature took into account population trends in creating certain districts, and asks if the

> Legislature were not 'entitled to anticipate a further drop' in the population of some districts and further growth in others. The difficulty with the argument made is that it is totally devoid of any tie to reality of the case at bar. * * * We do not intimate that population trends either are or are not significant and usable, but the difficulty in respect of their use is that a basic constitutional right may be lost to a speculative future event, an unequal trade at best and at worst a cynical deprivation. The proof of a 'trend' must be compelling, immediate, and inescapable to justify disfranchisement." (228 F. Supp. 824, 827-828)

See also *Klahr v. Goddard, supra* at 540. Judge Celebrezze, in his dissent, correctly analyzed the relevancy of population trends. He stated, "(w)hile the majority is correct in saying that we must accept as true the facts of uneven population growth and population shifting among the 24 Ohio districts, there has been no showing how these population shifts have occurred in all the congessional districts. If the projected population growth estimates are not statistically reliable, then we must return to the basic disparity of total variance of 34.1%. This variance cannot be constitutionally justified."

Only in Kansas, where an annual state-wide census is required by state law, did the court accept population figures other than those based upon the 1960 census. *Meeks v. Avery, supra.*

Appellants recognize that the use of the federal decennial census is not constitutionally required. *Meeks v. Avery, supra; Burns v. Richardson,* 384 U. S. 73, 97 (1966). However, the questions in this case of the use of population figures other than those obtained in the 1960 Federal Census, and of the use of population trends in constructing congressional districts, are wholly different from the issue before the Court in *Burns v. Richardson, supra.*

In that case the question was whether the legislature could use state-wide figures derived from voter registration data in place of population in apportioning state senators for the 1966 election.

Contrary to the opinions in *Maryland Citizens Comm. for Fair Cong. Redist. v. Tawes, supra,* and *Calkins v. Hare, supra,* the majority opinion approved of the legislature's effort "to project population trends" (p. 11). The court concluded that basic population data of the 1960 federal census was properly "augmented by more recent information and estimates supplied in general by the Ohio Department of Development, by the Citizens League for Cuyahoga County specifically, and the Columbus Area Chamber of Commerce research staff in the case of Franklin County." (pp. 11-12) This conclusion of the Court was *not* based upon documentary evidence showing the actual data upon which the Study Committee, and the General Assembly, relied because no such evidence was introduced by appellees, but upon the "recollections" of Representative Kurfess. His testimony on cross examination by Mr. Lehman, appellants' attorney, was as follows:

> "Q. What was the source of your population figures that were considered by the Study Committee?
>
> A. Primarily the departments of the State of Ohio, and as presented to us by—I forget the gentleman's name who headed up this research staff as to population—
>
> Q. And do you have any of the material or figures which your Committee considered here with you today?
>
> A. No, I don't.
>
> Q. Can you tell us whether these figures were based upon the 1960 census?
>
> A. Excuse me. I think I might have misunderstood your previous question. We, of course, started with the 1960 census figures. This we had.

Q. For what? The 1960 census for what?

A. For the State of Ohio by county, and they are broken down also by subdivisions. Then the estimated figures that I referred to earlier for 1964 were provided generally, I think, by the Department of Development, however they were provided. *I think* with regard to Cuyahoga County it was by the Citizens League. In Franklin County, *I think* they came from Representative Wylie, a member of the Legislature from Franklin County, and *I think* they were provided him by the Chairman of the Chamber of Commerce's Research Staff.

Q. What was the source of these figures that were presented to you estimating the 1964 population? By "source," I do not mean who presented it. *What was the basis for their figures?*

A. *I very honestly could not detail that to you specifically.*

Q. Would it appear in the summary or any of the documents that we have here as exhibits?

A. Again, to the best of my knowledge, no. The Department of Development, the head of that particular area, a Ph.D. whose name leaves me at the moment, did testify lengthily at one of our original sessions with regard to how they arrived at these 1964 estimated figures, but I couldn't—I am a little out of my field at this point. I couldn't go into detail as to what all they took into consideration.

Q. Were there any census figures based upon taking of a census by a Federal or state agency at any time subsequent to 1960 submitted to your Committee?

A. Not to the best of my recollection, no." (Tr. 43-45) (Emphasis supplied.)

The 1960 population census is the only valid criteria against which to measure the constitutional validity of the Ohio congressional districts. If current census figures and

population trends are to be considered, "reliable and convincing data must be used, *and must be applied to all districts.*" (Emphasis supplied.) Dissent of Judge Celebrezze. (d2) The testimony of John F. Mackin, Appellees' second witness, has no meaningful value in this case. Mr. Mackin's testimony offered the approximate population of two of 24 districts on July 1, 1966. As Judge Celebrezze correctly noted, "(e)quivalent data was not introduced in respect of twenty-two of the twenty-four districts." (d2)

According to Mackin's testimony, the population of District 15 increased from 351,760 in 1960 to 439,678 on July 1, 1966, almost 90,000 people. (Tr. 86) What do we measure this population against? Has the population of District 11 (+8.0%), one of the faster growing areas in the state, also grown by 90,000 or more, so that it exceeds the average size district in 1966 by more than 20%? Has District 5 (—12.3%), a western district with a population of 354,129 in 1960, continued to lose population so that in 1966 it varies from the average district by more than 20%? Is the same not true for District 10? Is District 9, (+13.0%) Lucas County, now the largest district in the state? The majority opinion acknowledged that such data was not available. (p. 12)

The legislature did not even have the benefit of Mr. Mackin's data for 1964. (Tr. 107-108) The Appellees did not offer or introduce any statistics or data from which the General Assembly concluded that there were clear population trends in 1964. The record contains no explanation for the population deviations. There is no presumption that adequate reasons exist. *Jones v. Falcey, supra; Calkins v. Hare, supra.* Any conclusions as to population trends in Ohio in 1964 or 1966 would be pure speculation.

In this respect the majority opinion first concurs, then concludes the opposite. On p. 12 of the opinion the Court states, "* * * it may not be said that the overall redistricting is based upon such a degree of statistical stability and accuracy that the proof of correctness of the legislative intuition in two specific instances demonstrates the validity of the entire plan." Yet, on page 21, the court then stated, "(r)ecognizing the population trend *now judicially noticed by this Court* * * *. The General Assembly entered the mathematical thicket feared by the courts in accomplishing mid-decade redistricting." (Emphasis supplied.) Again, there is not a scintilla of evidence in this record to demonstrate population trends in any area in Ohio during any period after 1960, except Franklin County in July, 1966.

A third criterion recommended to the Ohio General Assembly was that "to the extent practicable, the residence of incumbent Congressmen and Congresswomen-elect be taken into consideration." This criterion has not been accepted by the courts in congressional districting cases as rational state policy. The Supreme Court of New Jersey said, "we repeat that the Constitution does not protect incumbents, leaving the review of such action to the electorate alone." *Jones v. Falcey, supra* at 108. A motive to retain incumbent congressmen, said the court in the *Drum* case, "may not predominate over the requirements of practical equality." 250 F. Supp. 922, 925. The Record is devoid of any evidence that this criterion was or was not followed by the General Assembly. The majority opinion acknowledges that this standard has not been "judicially established," but then gives such criteria weight by considering it as an aspect of "practicality." (p. 16) The majority opinion, contrary to accepted legal principle, approved not only of legislative recognition of

residency of congressmen, it also sought to throw an umbrella of protection over incumbency itself. (p. 22)

The fourth criterion recommended to the Ohio General Assembly by its Study Committee was that, "* * * where feasible the boundary lines of local units of government and present congressional districts be followed." Of the criteria promulgated by the Study Committee the first portion of the fourth standard is the only one judicially recognized as consistent with rational state policy. *Swann v. Adams, supra.*

The New Jersey Supreme Court has acknowledged that a "limited" deviation is acceptable "if it is needed to stay within the lines of existing political subdivisions and thus to avoid the spectre of party gerrymandering." *Jones v. Falcey, supra,* at 107. However, if the lines of political subdivisions are ignored, it continues, "there is no apparent reason for not achieving mathematical equality, subject of course to inevitable de minimis variations." *Id.* at 108. However, the court later said; "(b)ut when the deviation obviously exceeds that needed to permit the use of the lines of political subdivisions, the deviation spells out unconstitutionality, and a court must so hold unless the records affirmatively reveal a tenable basis for the legislative action." *Id.* at 109. See also *People ex rel. Scott v. Kerner,* 33 Ill. 2d 460, 211 N. E. 2d 736, 737 (1965).

It is evident from an examination of the Ohio Congressional Districting Map that, wherever it suited their purposes, the General Assembly ignored county and municipal boundary lines. The greater variances exist in those districts where the legislature avoided county lines, or was allocating sections of large municipalities. See Districts 1, 2, 3, 11, 12, 14, 15, 16 and 19. Also, compare District 5 (—12.3%) and District 9 (+13.0%) where, al-

though contiguous, the legislature, in this instance, did not cut across the Lucas County boundary line. The majority opinion did not conclude otherwise, but merely justifies the statute by references to the "practicability" of the situation, and the "good faith effort" of the legislators (pp. 12-22).

The testimony of Representative Kurfess established that only two of the twenty-four congressional districts remained intact, and that seventy-eight of the eighty-eight counties in Ohio were aligned in new congressional districts. (Tr. 56) The General Assembly certainly did not follow the latter part of the fourth criterion.

CONCLUSION.

As is evident from the transcript in this case and the foregoing brief, the question presented by this appeal is substantial.

There is not equality of population among congressional districts in Ohio.

The record does not evidence any legitimate considerations incident to the effectuation of a rational state policy which justify the gross disparity of population between congressional districts in Ohio.

The tortuous boundary lines and the lack of compactness and contiguity of the congressional districts in Ohio reflect the arbitrariness, irrationality and discrimination resulting from Section 3521.01 Ohio Revised Code.

The majority opinion of the trial court is not consistent with the interpretation of Article I, Section 2 of the Constitution of the United States as that section has been interpreted by the Supreme Court in *Wesberry v. Sanders, supra, Reynolds v. Sims, supra, Swann v. Adams, supra, Duddleston v. Grills, supra,* and *Kirkpatrick v. Preisler, supra,* and is in direct conflict with

each and every of the congressional districting cases decided in other state courts and federal district courts.

Accordingly, the order of the trial court should be reversed, and this case should be remanded with instructions to the trial court to forthwith order the redistricting of the Ohio Congressional Districts by the Ohio General Assembly in accordance with Article I, Section 2 of the United States Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

The undersigned, attorney for Appellants, herewith certifies that on the first day of September, 1967, he served copies of the foregoing Jurisdictional Statement on each of the parties to this suit, by mailing a copy by U. S. mail, postage prepaid, to their attorneys of record, William Saxbe, Attorney General of the State of Ohio, and William D. Van Tilburg, 124 Church Street, Ashland, Ohio.

HARRY J. LEHMAN.